



POLICE DEPARTMENT

April 27, 2011

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Elsa Segundo  
Tax Registry No. 929458  
Brooklyn Court Section  
Disciplinary Case No. 84126/08

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The above-named member of the Department appeared before me on February 15, 2011,<sup>1</sup> charged with the following:

1. Said Police Officer Elsa Segundo, assigned to the 107 Precinct, while off-duty, on or about April 16, 2008, in Queens County, did steal property, to wit: a baby carrier from a Babies R Us store.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT  
N.Y.S. Penal Law Section 155.25 – PETIT LARCENY

2. Said Police Officer Elsa Segundo, assigned to the 107 Precinct, while off-duty on or about April 16, 2008, in Queens County, did knowingly possess stolen property, to wit: a baby carrier with intent to benefit herself or a person other than an owner thereof or to impede the recovery by an owner thereof.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT  
N.Y.S. Penal Law Section 165.40 – CRIMINAL POSSESSION OF STOLEN  
PROPERTY IN THE FIFTH DEGREE

3. Said Police Officer Elsa Segundo, assigned to the 107 Precinct, while off-duty, on or about April 16, 2008, in Queens County, did steal property, to wit: a gift card valued at one hundred thirty dollars and four cents (\$130.04) from a Babies R Us store. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT  
N.Y.S. Penal Law Section 155.25 – PETIT LARCENY

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<sup>1</sup> The trial record was held open until March 1, 2011, for the receipt in evidence of a verified transcript of a tape-recorded interview.

4 Said Police Officer Elsa Segundo, assigned to the 107 Precinct, while off duty on or about April 16, 2008, in Queens County, did knowingly possess stolen property, to wit a gift card valued at one hundred thirty dollars and four cents (\$130.04) with intent to benefit herself or a person other than an owner thereof or to impede the recovery by an owner thereof (*As amended*)

P G 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT  
N Y S Penal Law Section 165.40 – CRIMINAL POSSESSION OF STOLEN  
PROPERTY IN THE FIFTH DEGREE

The Department was represented by Mark Berger, Esq., Department Advocate's Office, and the Respondent was represented by John Arlia, Esq.

The Respondent, through her counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

### DECISION

The Respondent is found Not Guilty.

### SUMMARY OF EVIDENCE PRESENTED

#### Introduction

It is not disputed that on April 16, 2008, eight days after she gave birth to a baby boy, the Respondent, who was off-duty, entered the Babies R Us store at 139-19 20 Avenue, Queens.

#### The Department's Case

The Department called Joseph Delio and Sergeant Peter Libranti as witnesses.

Joseph Delio

Delio, who resides in Suffolk County and is presently unemployed, recalled that during April, 2008, he was the assistant store manager at the Babies R Us store at 139-19 20 Avenue, Queens. He recalled that he was working on April 16, 2008, when Jessica Ruesta, one of his employees who usually worked at the return desk and who he considered to be a very good, responsible worker, came into his office "and said that she had done an even exchange and that at the end of the exchange another item had appeared to be returned and she was a little confused about the transaction" and she asked him "if I could just look into it." She asked him "to research it a little bit because she felt a little uneasy about the transaction, that something just didn't seem right."

Ruesta told him that the even exchange was for diapers. Ruesta told him "that a guest came in the doors with diapers in her wagon and said that she had the wrong size and wanted to do an even exchange. Jessica said go ahead, grab the ones you want. She went to the back of the store and then came back to the service desk and they did even exchange of the diapers." She stated it was just an even exchange for diapers of a different size which had the same price and that it involved a receipt.

She said that the guest had then lifted up her purse and slid another item over and stated she wanted to return this item as well. She told him that "she was a little unsure about the item but she asked for ID and she did the return using the guest's ID." As she conversed with the guest, she took a value card and put the credit of the item on a store value card and handed it to the guest.

Delio then looked at the video tape of the transaction which had been recorded by a store camera which was focused on the return desk. He took out this surveillance video

tape, transferred it onto a DVD disc and handed it to a Department sergeant who interviewed him on April 22, 2008. Delio identified this DVD disc in the Trial Room, the DVD was entered into evidence [Department's Exhibit (DX) 1] and the DVD was played for him. Delio described Ruesta's actions as seen on the DVD.

Delio then investigated the transaction by looking at the transaction history through the store's computer database to see what Ruesta had entered into the computer. He identified a computer copy of the exchange that took place regarding the diapers (DX 2) which showed that the guest had presented a receipt that she had previously purchased the items and then returned the diapers using that receipt. He testified that a driver's license would not be necessary for this transaction.

He also identified a computer copy of the exchange that took place regarding a baby carrier (DX 3) being returned as a returned item. He testified that the transaction history indicated that from the time the diaper exchange ended until the baby carrier transaction began was two minutes and that the return did not involve a receipt. A New York driver's license, number 173851761, was presented as ID for the return. The transaction record showed that the customer received, after the return was completed, a store value card for \$130.04 and that the balance on the card was the exact amount that was refunded. He testified that when a customer uses a value card to make a purchase and there is no dollar balance left on the value card at the end of the transaction, the cashier normally keeps the value card and puts it in the register. He agreed that there have been times when customers have walked into the store not knowing that their card was empty and had tried to use the empty card in a transaction because a customer cannot tell from the face of a value card what the balance is on the value card just by looking at it. The only

way a person can know what, if any, dollar amount is on a value card is if it is scanned through a store register at a Babies R Us store

On cross-examination, Delio conceded that at that point in time there were numerous ways in which a customer could be credited at the time of an exchange and that it was possible that a customer could get a credit back from a return on a preexisting value card by presenting a value card that they had prior to entering the store, not a newly issued card. Delio also conceded that he cannot tell from the transaction history whether a new card was issued based on the computer printout. When Delio was asked whether Ruesta had told him that the Respondent had tricked her, he answered that she said that she 'felt like' the Respondent "was kind of smoothing everything over and talking to her like she was her best friend." Delio agreed that there was an exchange of a telephone number between the Respondent and Ruesta, that Ruesta had tried to call that number, which was left on a piece of paper, to tell the Respondent that she had left her driver's license behind in the store, but Ruesta said she only got a fax machine. (646) 369-9201 was the number that was on the paper.

Delio agreed that a person cannot tell when a value card was created by physically looking at the card. He agreed that the DVD shows that when Ruesta pulled Pampers off of the counter, she may have taken the wrong Pampers off the counter. On the DVD, he did not see any value card being taken from the Respondent or any value card being handed over. He estimated that zero balance value cards are given back to the person about ten percent of the time.

Sergeant Peter Libranti

Sergeant Libranti assigned to Internal Affairs Bureau (IAB) Group 27, testified that on April 24, 2008, he and Lieutenant Renna interviewed Ruesta.

She told them that April 16, 2008, at the store "was a busy night. It was me and someone else in service. We were billing, serious case around the same time, a couple of minutes before that, somebody stealing and got complaints also. She got caught and he let her go and I had realized that this girl had always come to the store and do exchange and returns, but her ID expired, so she also brings someone else to do the returns for her. She was pregnant when she used to come often. This day she came around probably 2:00 and bought Pampers. And went home, and came back around this time when the incident happened, she was coming in, she showed me the Pampers on the shopping cart. She said Jess, she knows my name, she sees me every time here, and she's told me that she was going to make exchange for another size because she had a little size earlier. So I say fine, so she went in. Went to get another Pamper, we usually keep the Pampers on the floor and let them go and get whatever they have to get. But she just had mentioned to me the box of Pampers, so I saw it because I was on the, the right hand side of the counter, and I see everyone that comes through. So when she got to the line, we made an even exchange because it was the same, the price was the same, and it was the same price but different size but it was even exchanged. So I give, her exchange and she took the right sized pamper and left the one that she had bought earlier.

After that, she took a carrier and gave it to me and said, you know what, Jess, give me a value card for this carrier. It was a big line, it was a very hectic day, so I took her ID, expired ID, put it through the system, put the carrier as standard, and it came out to

\$139.99 Usually the carrier they have alarms, but this day they forgot to put it in. So she left, and I went outside to look for her to let her know that her ID was left on my counter because we usually have to put the whole process, the name and address, and everything to get the credit. In my mind I was like, you know, it didn't seem right that when she came in she didn't show me the carrier.

So after two or three minutes, I went back to the office, and I mentioned to Joe Delio that he could go back and check the video because this girl I thought inside me she was doing something wrong because she was trying to, "Jessica give me the value card, I have to go, the baby is in the house, I can't wait no more." So she was really in a hurry. So I said okay, I gave her the value card and she bounced. When I went back to look for her to give her, her ID I went outside, she wasn't there.

So I went back to Joe Delio and I said let's go back on the video camera, and make sure that she came in with the items, because that's what we usually do try to see you know, when a customer comes in. So we both check the video and we both saw her in the video you could see it. Going to the Pampers, which is close to the carriers, it's in the same aisle. So she went and got the Pampers and also the carrier, and put it in the shopping cart. So me and him, we're looking at the video twice to make sure we you know were seeing the right thing. So we went back to the counter and I say here Joe Delio, she also left me her license.

So I had mentioned to him that she always used to talk to me, and tell me that she was a police officer, that she was you know, on maternity leave as soon as she was gonna get better to go back to the, uh, this customer comes very often so you remember their faces you get to talk to them, they tell you stories and know them so it's always me and

someone else in the front I remember her, I know, I had a feeling that she was stealing it because, you know, when you see a customer coming most of the time returning a lot of items without receipts, hey, something is going on Either you have a value receipt or a regular receipt, so she would always come with her registry and say, uh, let me use my friend's ID because mine's expired So I made a mistake of taking her expired ID And you know, the first thing you do when something like that happens is you have to let a manager know what you did So, I said to him I think I made a boo-boo I took the expired ID, which I wasn't supposed to do But then we go back and check that's when me and him say boom we got her So I said, I mentioned to him, you know she's a police officer, she had told me several times that she works in the street, blah, blah, blah, blah, blah, blah And like I, I went to him and said, you know, you deal with it I'm here to tell you what I saw I didn't really see her stealing, but the camera shows what she did "

Later in the interview, Ruesta stated, So when we were having the incident the, the associate I mean, customer stealing a pack and play she was on the line, so she saw what happened, we were dealing with this black girl that was filling out a complaint And me and Joe D were talking to her, telling her, you know, you stole the item, you know, we're not going to take it back, get away from the store or you're going to get arrested She was in the line, and I said to her, you're a police officer, if you were wearing your uniform wouldn't you have arrested her She said, oh a lot of people be doing this "

The Department offered in evidence an affidavit Ruesta signed (DX 5) which states that the Respondent "told her that she wanted to return the baby carrier for store credit "



The Respondent's Case

The Respondent testified in her own behalf

The Respondent

The Respondent, who is presently assigned to Brooklyn Central Booking and who has been a member of the Department for eight years, recalled that on April 16, 2008, she entered the Babies R Us store, which she had been to about a dozen times, carrying a box of Pampers to make an exchange of the size six Pampers she had purchased for a smaller size of Pampers, size five, for her toddler. Upon entering the store, she told Ruesta that she was exchanging a box of Pampers. She did not state that she had any other items for exchange or return. Ruesta knew her and she knew that she was a New York City police officer. Ruesta had expressed interest in becoming a New York City police officer.

The Respondent recalled that she proceeded down the aisles and picked up the size five Pampers and placed it in her cart. She then saw a baby carrier that she wanted to purchase. She placed it in her cart and then proceeded to the service section. She was aware that there are video cameras in the store.

Outside in the parking lot, her mother, who was ill, was inside her car watching her eight-day-old son and her toddler. She wanted to get back to the vehicle as soon as possible. There was a long line at the register and she had to wait on this line for 15 to 20 minutes. When she reached the head of the line, she told Ruesta that she was exchanging a pack of Pampers, which she had already told her, and she placed the packs of Pampers on top of the counter. She was stressed and in a hurry to get back to her car and she noticed that Ruesta was stressed and nervous. She handed Ruesta her driver's license, her gift card

and her receipt. She did not know what the balance was on her gift card. She handed Ruesta her driver's license because sometimes she pays with a credit card and since they have to see ID, she always automatically handed over her ID. In this case, she had paid for the Pampers size six that she was exchanging with a gift card. Since she was exchanging the size six for a smaller size, and since she knew that the price of Pampers can vary according to the size, she handed Ruesta her gift card in case there was a price differential refund.

Once she had placed the two packs of Pampers and the baby carrier that she intended to purchase on the counter, she noticed that Ruesta seemed to be making mistakes because she tried to give her back the size six Pampers when she wanted to exchange them for the size five. She decided not to purchase the baby carrier because Ruesta was making mistakes and because she just wanted to get back to her car and it was taking longer and longer to check out at the register. She was fed up and just wanted to get out. She told Ruesta to give her back her gift card so she could leave. Regarding the baby carrier, she never told Ruesta that she was returning it. She told her, "I don't want this right now." She never told Ruesta to give her a credit and Ruesta did not give her a new card. She never checked any of the paperwork that Ruesta gave her as she was leaving because she left in a rush to get back to her mother and her children in the car. She put the paperwork in her bag and left the store. She left in such a rush that she left her license behind. She did not intend for Ruesta to improperly credit her gift card.

She recalled that she gave Ruesta her telephone number which is the same number that Delio testified that he obtained from Ruesta. This telephone number does not go to a fax machine. It is her cell phone number. She was not aware that Ruesta had

improperly credited her card. She recalled that Ruesta had made a mistake when she confused the packs of diapers and placed the diapers that she was trying to obtain through the diaper exchange on the floor. She gave Ruesta her telephone number because Ruesta had told her that she was trying to get another job and she had told Ruesta that the Police Department was a great place to work.

On cross-examination, the Respondent denied that she had suffered any mental problems following the birth of her child eight days before the date of this incident. During this incident, her mental state at the time was that she needed to get back to her child who was in the car with her ill mother. She could not recall what she did with the gift card. She was arrested ten days after the incident. She never tried to use the gift card before she was arrested. She no longer has the receipt from the diaper purchase she had made earlier that same day.

The Respondent testified that she did not see Ruesta scan the baby carrier. The Respondent was then shown the store video. After she viewed the video, she was asked if she saw that the video depicts Ruesta scanning the baby carrier. The Respondent answered that because she was standing in front of the register, and because she was putting things into her wallet inside her pocketbook, she was not looking at what Ruesta was doing and she did not see Ruesta scan the baby carrier. She could not recall when Ruesta gave the gift card back to her. She was not in a rush when she entered the store but she was in a rush to get out of the store after Ruesta made her mistake regarding the diaper exchange and after waiting in line for a long time to even get to the register. She agreed that the fact that Ruesta had made a mistake with the diaper exchange was a factor in her decision not to purchase the baby carrier. She could not recall when she gave Ruesta her telephone

number She discussed the benefits of being a member of the Police Department with Ruesta during the transaction She could not recall what time she left the store

## FINDINGS AND ANALYSIS

### Introduction

It is charged that the Respondent, while off-duty on April 16, 2008, stole a baby carrier and a value card, which had a value of \$130.04, from the Babies R Us store at 139-19 20 Avenue, Queens ("the store") and that she knowingly possessed these two items of stolen property

The theory proffered by the Assistant Department Advocate ("the Advocate") as to how the Respondent committed these alleged dual larcenies differs from the standard theft scenario, and the common modus operandi, presented in most 'shoplifting' cases<sup>2</sup> in that the Department does not allege that the Respondent walked out of the store, or that she even attempted to walk past the store's cash registers, while in possession of merchandise that she had not paid for Here, the Department alleges that the Respondent engaged in a bogus return-of-merchandise-previously-purchased scheme in order to obtain a value card with a credit balance of \$130.04 which she could use to make future purchases at the store

The Department alleges that the reason that the Respondent removed a baby carrier with a price tag of \$130.04 from a shelf in the store and brought it to the cashier's counter in the front of the store was not because she was contemplating purchasing the baby carrier as she claims, but because she intended to falsely tell the cashier that she had

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<sup>2</sup> See e.g. recent Disciplinary Case Nos. 84497/08 signed on September 22, 2010, (where a member stole electronic equipment from a Target and a pair of sandals from a Sports Authority store), and 84586/08, signed on February 23, 2010, where a member was found guilty stealing lotion, two bras, a pair of pants, and compact discs from a Target store

purchased the baby carrier on a previous visit to the store and that she had brought it back into the store that day in order to return it and obtain a store credit for the amount of the purchase price she had paid for the baby carrier

This larceny theory is the premise for the charge that on April 16, 2008, the Respondent stole a baby carrier, even though the Advocate conceded that she did not take a baby carrier out of the store that day. This larceny theory is also the premise for the charge that on April 16, 2008, the Respondent stole a value card containing a balance of \$130.04, even though the Advocate argued that the reason that the cashier had handed the Respondent a value card on which the cashier had entered a store credit in the amount of \$130.04 was because the Respondent had left the baby carrier with the cashier.

These allegations that the Respondent stole a baby carrier and that she also, concurrently, stole a value card appear to be mutually exclusive. However, I need not reach the issue of whether the Respondent can only be found to have either stolen the baby carrier or the value card but not both, because I find that the Department did not present evidence which sufficiently proved that the Respondent intentionally stole anything from the store on April 16, 2008, or that she knowingly possessed any stolen property.

The Department's evidence consisted of Libranti's interview of Ruesta (DX 4) and Delio's testimony regarding what Ruesta said to him when she walked into his office on April 16, 2008, both of which were offered as hearsay at this trial, the affidavit Ruesta signed (DX 5), the DVD of the store's surveillance video depicting the Respondent's interaction with Ruesta (DX 1), and Delio's testimony interpreting Ruesta's actions as depicted on the video tape, explaining the entries on the cash register transaction tape regarding the Respondent's transactions as recorded by Ruesta (DX 2 and 3), and

explaining normal store procedures regarding returns of previously purchased items and value cards

The Hearsay Statements of Ruesta and the Affidavit She Signed

Ruesta signed an affidavit (DX 5) attesting that the Respondent had "told her that she wanted to return the baby carrier for store credit." The Respondent has consistently asserted that she did not tell Ruesta that she was returning the baby carrier and the Respondent testified that she only asked Respondent to return her value card, which she had handed to Ruesta regarding the Pampers exchange, and that she did not ask Ruesta to give her a new value card in the amount of the purchase price of the baby carrier.

Thus, Ruesta's credibility is central and critical to the Department's case not only because her hearsay statements are the only evidence offered by the Department that the Respondent had stated that she had purchased the baby carrier previously and that she was returning it to obtain a store credit for it, but also because Ruesta's hearsay claim that she issued a new value card to the Respondent is uncorroborated since Delio conceded that he could not tell from the computer transaction history whether a new card had been issued.

Although a disciplinary finding may rest upon uncorroborated hearsay alone, hearsay declarations are insufficient to support a finding of guilt in a case that presents close questions of credibility,<sup>3</sup> as this case does. The hearsay declarant's failure to appear to testify makes it impossible for the fact-finder to observe testimonial demeanor. Also, where the hearsay declarations are central to the agency's case, as they are here, questions of due process and basic fairness arise because the Respondent is denied the ability to

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<sup>3</sup> People Ex Rel Vega v Smith, 66 NY2d 130 (1982)

confront the hearsay declarant and test the credibility of the declarant's account through cross-examination<sup>4</sup>

The credibility of Ruesta's assertions must be examined in light of several factors. The very first thing Ruesta stated to Libranti was that only minutes before her interaction with the Respondent regarding the Pampers and baby carrier, an incident had occurred in the store involving "somebody stealing" a "pack and play" and that this incident had led to her to approach Delio regarding her transaction with the Respondent. Ruesta also told Libranti that at the point in time when her interaction with the Respondent regarding the Pampers and the baby carrier took place, the store was "very busy," there was "a big line" at her register and "it was a very hectic day," and "she was in a hurry" and "I was also in a hurry too because there were people waiting in the line." Most significantly, Ruesta admitted to Libranti that she had made a "mistake" and a "boo-boo" by accepting an expired ID from the Respondent. Finally, although Ruesta told Libranti that she had a "feeling" that the Respondent was stealing, she emphasized to Libranti that, "I didn't really see her stealing."

Delio acknowledged that when Ruesta walked into his office, Ruesta did not assert that the Respondent had committed a phony return-of-a-baby-carrier-previously-purchased scheme in order to steal a value card with a credit balance of \$130.04. Rather, she told Delio that "she had done an even exchange and that at the end of the exchange another item had appeared to be returned and she was a little confused about the transaction" and she asked "if I could just look into it." She asked him "to research it a little bit because she felt a little uneasy about the transaction, that something just didn't seem right."

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<sup>4</sup> See *Gordon v. Brown*, 84 NY2d 574 (1994).

Thus, it is clear that Ruesta was not only unsure as to whether the Respondent had stolen a baby carrier, since Ruesta referred to the baby carrier as an "item," she was apparently so confused that she was not even certain as to what the Respondent had returned

Since Ruesta did not appear to testify at this trial, Respondent's counsel did not have opportunity to cross-examine her regarding whether the real reason that she had walked into Delio's office was because she was concerned that she had personally made a mistake during her transaction with the Respondent and that her mistake would come to his attention

Based on this analysis, I find that Ruesta's hearsay statements constitute insufficiently reliable evidence on which to base a finding of guilt

The Store's Video Recording of the Respondent's Interaction with Ruesta

I find that what is seen on the video tape recorded by the store's surveillance camera regarding the Respondent's interaction with Ruesta (DX 1) is not dispositive on the central question of whether the Respondent told Ruesta that she was returning the baby carrier for store credit

Since Delio did not overhear any of the conversation between Ruesta and the Respondent, his testimony at this trial regarding their interaction was limited to describing Ruesta's actions and the Respondent's actions as depicted on the video tape. Based on Delio's testimony that when he viewed the video he saw that the video depicts Ruesta scanning the baby carrier, the Department contended that the Respondent must have seen Ruesta do this because Ruesta was right in front of her. However, the Respondent testified



that because she was standing in front of the register and because the video shows that she was looking at and reaching into her pocketbook at the point in time when Ruesta is depicted scanning the baby carrier, she did not see Ruesta scan the baby carrier. It is not clear on the video that the Respondent was looking directly at Ruesta at the point in time when Ruesta is seen quickly scanning the baby carrier.

As to the other actions depicted on the video tape, the Respondent's action of handing Ruesta the baby carrier and Ruesta's action of placing the baby carrier on the side of the counter, as depicted on the recording, is just as consistent with the Respondent's claim that she told Ruesta that she had decided that she did not want to purchase the baby carrier as it is with Ruesta's claim that the Respondent told her that she was returning a baby carrier that she had previously purchased. Also, although Ruesta is seen handing the Respondent a value card, this action, similarly, is just as consistent with the Respondent's claim that she had handed Ruesta a value card she already possessed in case she was entitled to receive a credit on the Pampers she was exchanging as it is with Ruesta's claim that the Respondent had requested a value card in the amount of the purchase price of the baby carrier. Also, although Delio testified that the video does not show the Respondent handing Ruesta a value card, it does show the Respondent handing Ruesta her license and the value card could have been under the license.

One unambiguous action that is depicted on the recording is when Ruesta is seen mistakenly handing the Respondent back the same Pampers that the Respondent was seeking to exchange for a different size. The fact that Ruesta started to hand the Respondent back the same Pampers that she had come into the store with and was seeking to exchange constitutes evidence that Ruesta was not mentally focused on this transaction.

and that, as she told Delio, she was confused about the transaction and what she did during the transaction

The Entries Ruesta Made on the Cash Register Computer Transaction Tape

Delio testified that the cash register transaction tape regarding the Respondent's Pampers transaction at the store that day shows that at 6 48 p m , Ruesta approved an "exchange" of one \$39 69 pack of "Snug Dry Val" for another \$39 69 pack of "Snug Dry Val" (DX 2). Thus, the cash register transaction tape corroborates the Respondent's testimony regarding the Pampers exchange transaction.

Delio also testified that the cash register transaction tape shows that at 6 50 p m , Ruesta approved a "refund" of \$130 04 regarding a black/silver active carrier and that this refund was credited to a store value card (DX 3). Although this cash register transaction tape is consistent with Ruesta's claim that the Respondent returned a baby carrier for a refund, this transaction tape does not constitute independent corroborative evidence of Ruesta's claim because it was Ruesta who created this record and, thus, the transaction record may only reflect that when the Respondent handed Ruesta the baby carrier, Ruesta mistakenly assumed that she was returning the baby carrier for a refund.

Ruesta acknowledged to Libranti and Delio that because it was a very hectic day at the store because there was a long line at her register, and because she and the Respondent were both in a hurry, she became confused during her transaction with the Respondent and this confusion may have caused her to make a mistake. Moreover, as noted above, the video shows that Ruesta did, in fact, make a mistake when she started to hand the

Respondent back the same pack of Pampers that the Respondent was exchanging for a different size

Based on this record, I find that the cash register transaction tape documenting Ruesta's approved refund of \$130.04 for the return of a baby carrier is insufficiently reliable evidence that the Respondent engaged in a bogus return-of-merchandise-previously-purchased scheme

The Testimony of Delio on Store Procedures Regarding Returns and Value Cards

Delio explained normal store procedures regarding returns and value cards. With regard to normal store procedures regarding returns, Delio testified that if the Respondent was only exchanging one size of Pampers for another using a receipt, there was no reason for the Respondent to hand Ruesta her driver's license (as it is undisputed she did since she left it behind when she exited the store). However, the Respondent's action of handing Ruesta her driver's license does not, by itself, establish that she knew that Ruesta was entering on the cash register transaction tape that the Respondent was returning the baby carrier for a refund.

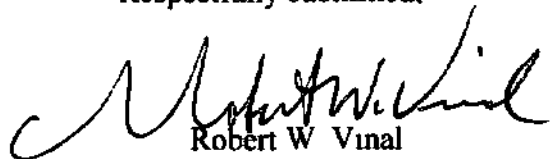
With regard to normal store procedures regarding value cards, on cross-examination Delio agreed that sometimes customers walk into the store not knowing that their value card is empty and try to use their zero balance card in a transaction because a customer cannot tell from the face of a value card what, if any, dollar balance is left on the value card just by looking at it. Delio agrees that the only way a customer can know what, if any, dollar amount is on a value card is if the card is scanned through a register at a Babies R Us store. Thus, it is not disputed that when Ruesta handed the Respondent a

value card at the end of their transaction, the Respondent would not have been able to tell from the face of the card that the dollar balance on the card was \$130 04. Finally, although Delio testified that where a value card that is presented to make a purchase results in the value card having a zero balance normally the value card is retained by the cashier, this testimony regarding normal procedure constitutes only circumstantial evidence. Moreover, on cross-examination, Delio agreed that it would not be extremely unusual for a cashier to hand a value card back to a customer even where the cashier's card reader indicated that the card had a zero balance. He estimated that this could occur as often as ten percent of the time where a card has a zero balance.

### Conclusion

Because the Department did not present evidence which sufficiently proved by a preponderance of the credible evidence that the Respondent committed the charged misconduct, I find the Respondent Not Guilty.

Respectfully submitted,

  
Robert W. Vinal  
Assistant Deputy Commissioner - Trials

**APPROVED**  
OCT 04 2011  
  
RAYMOND W. KELLY  
POLICE COMMISSIONER